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No. 85-952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

GRASON ELECTRIC COMPANY, et al.,
Petitioners,

vs.

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARGUMENT

CONTRARY TO THE SUGGESTION OF RESPONDENT THIS COURT HAS NEITHER TREATED NOR BEEN PRESENTED WITH THE APPLICATION OF THE STATE ACTION DOCTRINE TO *PROPRIETARY BUSINESS ACTIVITY* OF MUNICIPALITIES.

Respondent suggests that the distinction between the governmental and the proprietary functions of a municipality drawn by the Chief Justice in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978) has not survived the "evolution of this Court's thinking," and that, indeed, the Court laid the distinction to rest in *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713 (1985). (Opposition Brief, pp. 18-20) Petitioners respectfully take issue with Respondent's proposition and submit that the distinction between governmental and proprietary action has indeed survived. It is a

distinction with profound meaning in the case at bar and a profound impact on our national economy.

The only cases considered by this Court since *City of Lafayette* involving a municipal antitrust defendant were *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 102 S.Ct. 835 (1982) and *Town of Hallie, supra.* Neither case involved proprietary business activity of a municipality. *Boulder* involved governmental action in the form of *municipal regulation. Hallie* involved a City engaged in the municipal function of sewage treatment. Thus, this Court has not been presented with a case in which a municipality is engaged in a purely proprietary business activity in direct competition with private business, such as SMUD is in the instant case.

Indeed, the dissenting opinion of Justice Rhenquist in *City of Boulder, supra,* in which the Chief Justice and Justice O'Connor concurred, suggests that the distinction was very much alive in that case. There, Justice Rhenquist expressed great concern that failure to apply the state action doctrine could "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety and welfare." 455 U.S. at 60, 102 S.Ct. at 845. The dissent focuses specifically on the governmental aspect of municipal operation. That focus reaffirms the policy of immunizing *governmental action.*

Petitioners submit that the dissenters in *Boulder* would not have taken the same view had that case not been one of governmental regulation but instead one of proprietary business activity. This distinction is, of course, justified and in no way interferes with notions of federalism or the policy underlying the state action doctrine. It is inconceivable how immunizing proprietary business activity of a municipality furthers, serves or even relates to the policy underlying *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307 (1943).

The distinction between governmental action and proprietary action is of such critical significance in the case at bar because failure to recognize the distinction results in a manifest injustice and severe distortion of the policy of the antitrust laws as enunciated by this Court. The Petitioners are faced with a

business competitor that can operate free from the constraints of antitrust laws. Such will be the case with other municipalities that operate businesses that are often absolutely indistinguishable from a private concern. The motivation for business success, increased volume, and self-aggrandizement is the same for both private and municipal businesses.

To allow the economy to be distorted by a business in municipality clothing seems to be patently absurd and to serve no purpose except to confer economic gain upon a few at the expense of others and at the expense of our national economy. In its Opposition Brief, Respondent did not comment in any way regarding the likely impact of the Ninth Circuit's decision on this nation's businesses.

Respondent asserts that even if a meaningful distinction exists between proprietary and governmental municipal conduct, the activity here challenged is governmental. (Opposition Brief, p. 20) Respondent relies exclusively on *Pacific Gas & Electric Company v. Sacramento Municipal Utility District,* 92 F.2d 365 (9th Cir. 1937), *cert. denied,* 303 U.S. 640, 58 S.Ct. 610 (1938) to support its position. That case, however, dealt with the governmental-proprietary distinction in the context of a taxing power question not an anti-trust question.

Moreover, SMUD carefully over-generalizes its conduct as that of providing "electric service" or "power and light". While the provision of power to inhabitants *could* be, although need not be, a municipal activity, the electrical construction at issue here cannot be bundled together with the provision of electric energy. The provision and sale of electric energy is distinct from providing and constructing the equipment through which energy flows, and appliances in which it is consumed. While Petitioners and others do not sell energy, they are in the business of providing the same equipment and services as Respondent in this case. To find Respondent's electrical construction to be governmental action is to hold that private business is a governmental function.

CONCLUSION

For all of the reasons stated in the Petition and this Reply, Petitioners respectfully request that their Petition be Granted.

Respectfully submitted,

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